IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 7, 2006 Session

CARLTON J. DITTO v. DELAWARE SAVINGS BANK, ET AL.

Appeal from the Chancery Court for Hamilton County
No. 03-1234 Howell N. Peoples, Chancellor

No. E2006-01439-COA-R3-CV - FILED FEBRUARY 14, 2007

This case involves the validity of a delinquent tax sale which occurred while the property owner had a bankruptcy petition pending and the bankruptcy court's automatic stay was in effect. The issues presented are: did a creditor of the bankruptcy estate have standing to challenge the tax sale, and if so, should the tax sale conducted in violation of the automatic stay be declared void? The trial court ruled that the creditor did not have standing to challenge the tax sale. After careful review of the record and applicable authorities, we hold that the creditor did have standing to challenge the validity of the tax sale, and because the sale violated the automatic stay, the sale is void and of no effect to transfer title of the real property to the purchaser.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Melinda Meador, Matthew M. Scoggins III, and Edward C. Meade, Knoxville, Tennessee, for the appellants Delaware Savings Bank, F.S.B.; IMC Mortgage Company; Delta Funding Corporation; and Deutsche Bank NTC.

Hudson Owen Maddux and Jason S. Mangrum, Chattanooga, Tennessee, for the appellee Carlton J. Ditto.

OPINION

I. Background

The real property[1] involved in this case was purchased by Samevelyn Rock in 1983. She executed a deed of trust on the property in 1997, in favor of Delaware Savings Bank, F.S.B., to secure the repayment of a loan. This deed of trust was subsequently assigned to various other entities and as of the filing of this action, was held by Deutsche Bank. For purposes of convenience, Delaware Savings Bank, F.S.B. and all of these assignees are referred to herein as "the Bank."

In January of 1998, Ms. Rock filed a petition for relief under Chapter 13 of the United States Bankruptcy Code. Ms. Rock's real estate property taxes were unpaid and delinquent; and on June 7, 2001, while her bankruptcy case was still pending, her real property was sold to Carlton J. Ditto by the Hamilton County clerk and master pursuant to court order. Neither Hamilton County nor Mr. Ditto had notice of Ms. Rock's pending bankruptcy case at the time of the tax sale. A decree confirming the sale to Mr. Ditto was entered by the Chancery Court on June 15, 2001.

In October of 2003, Mr. Ditto filed a complaint against the Bank to quiet title to the real property. The Bank answered and asserted that its mortgage lien on the property was still valid because the tax sale and subsequent decree confirming the sale were void ab initio because Ms. Rock's bankruptcy case was still pending when the property was sold, and the sale violated the automatic stay that arises under § 362 of the United States Bankruptcy Code which prohibits the liquidation of property of a bankruptcy estate without prior authorization of the bankruptcy court. Later, the Bank filed a motion for summary judgment, arguing that the tax sale to Mr. Ditto be declared void upon these same grounds.

Mr. Ditto also filed a motion for summary judgment, arguing that the Bank was without standing to challenge the tax sale and stating in pertinent part, as follows:

> The tax sale and subsequent decree confirming the tax sale did not automatically violate the automatic stay under Bankruptcy law and therefore does not apply in that neither the Bankrupt, Mrs. Rock, nor her Trustee ever filed any type of action to void the back tax sale.
>
> 11 U.S.C. § 549 gives the Trustee or the Debtor only two years within which to attack the sale of the Bankrupt's property even if no notice was given. In addition, Federal Bankruptcy case Law and 11 U.S.C. § 522(h) provides that only the Bankrupt and/or her trustee can bring an action to set aside, in this case the back tax sale. Therefore, the Defendants not fitting this definition have no standing to challenge this Court's back tax sale to a bona fide purchaser for value, which occurred on June 7, 2001.

[1]The real property is located at 3205 Bon Air Circle in Chattanooga, Hamilton County, Tennessee.

After a hearing on the parties' motions for summary judgment, the trial court granted summary judgment in favor of Mr. Ditto and ruled that the Bank did not have standing to contest the tax sale. The Bank appeals the judgment of the trial court.

II. Issues

The issues we review are:

1) Did the Bank, as a pre-bankruptcy petition mortgage holder of the property, have standing to challenge the sale of the property to Mr. Ditto, an innocent purchaser, at a delinquent tax sale that was conducted in violation of the automatic stay of the United States bankruptcy court?

2) If the Bank did have standing, should the sale to Mr. Ditto be declared void?

III. Analysis

A. Standard of Review

There is no disputed question of fact in this case and therefore, it is an appropriate case for summary judgment. "Summary judgment is entered in favor of a party when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' Tenn. R. Civ. P. 56.04. Because summary judgment involves only questions of law and not factual disputes, no presumption of correctness attaches to a lower court's ruling on a motion for summary judgment. Thus, on appeal, we review the grant of summary judgment de novo to determine whether the requirements of Tenn. R. Civ. P. 56 have been met." *Owner-Operator Independent Drivers Ass'n, Inc. v. Concord EFS, Inc.*, 59 S.W.3d 63, 69 (Tenn. 2001) (citing *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991) .

B. Standing

The first issue we address is whether the Bank had standing to challenge the sale of the property to Mr. Ditto at a delinquent tax sale conducted in violation of the United States bankruptcy court's automatic stay.

The trial court's final order included the following findings and conclusions:

> The Court further finds that Samevelyn Rock was the registered owner of the property at the time of the back tax sale, that she had filed a Chapter 13 Bankruptcy on January 7, 1998, which was converted to a Chapter 7 Bankruptcy, and that she was discharged from that Bankruptcy on September 26, 2002. Further, that the tax sale and subsequent decree confirming the tax sale did not automatically violate the automatic stay under the Bankruptcy law; that the Bankrupt Mrs. Samevelyn Rock, nor her Bankruptcy Trustee,

> have ever filed any type of action to void the back tax sale, and that only she or her Trustee in Bankruptcy had standing to file an action to set aside the back tax sale. Thus based upon the facts and the law as applied to those facts, the Court finds that Delta Funding Corporation and Deutsche Bank National Trust Company neither owned the property at the time of the back tax sale, nor were they the Trustee, and therefore they have no standing to contest Carlton J. Ditto's ownership of said property at this time.

When Ms. Rock filed her bankruptcy petition, the petition acted as an automatic stay of all judicial proceedings against her. *Jones v. Cain*, 804 A.2d 322, 325 (D.C. Ct. App. 2002) (citing *Corto v. National Scenery Studios, Inc.*, 705 A.2d 615, 620 (D.C. 1997)). The stay extended to all "formal and informal actions against property of the bankrupt estate." *In re Smith*, 876 F 2d. 524, 525-526 (6th Cir.1989), and continued until the property was no longer part of the bankruptcy estate. 11 U.S.C. § 362(c)(1). The sale of Ms. Rock's property at a delinquent tax sale was prohibited by the stay and therefore, the sale of Ms. Rock's property by the clerk and master constituted a violation of the bankruptcy court's automatic stay. Although Mr. Ditto and the clerk and master had no notice of Ms. Rock's bankruptcy, notice of the bankruptcy filing is not necessary for the automatic stay to take effect. *National Mortg. Co. v. Brengettcy*, 223 B.R. 684, 695 (W.D. Tenn. 1998) (citing *In re Holman*, 92 B.R. 764, 768 (Bankr. S.D. Ohio 1988)). While § 362 provides that a party may obtain relief from the automatic stay upon application to the bankruptcy court, in this case no such relief was granted or requested.

On appeal, both parties agree that the sale violated the automatic stay and therefore, the question becomes: does the Bank, as a creditor of Ms. Rock's bankruptcy estate, have standing to challenge the tax sale as a violation of the automatic stay?

In order to challenge a violation of the automatic stay, a party such as the Bank must prove that it has both constitutional standing and prudential standing. *In re Pointer*, 952 F.2d 82, 85 (5th Cir. 1992). "Constitutional standing" is established by showing that the plaintiff has suffered a personal injury as the result of the allegedly illegal conduct of the defendant and that the injury suffered is likely to be remedied by the relief requested. *United States v. Miller*, No. Civ.A.5:02-CV-0168-C, 2003 WL 23109906, at *5 (N.D. Texas, filed December 22, 2003). "Prudential standing" is established upon a determination that "the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Id.* at *6 (citing *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 560 (5th Cir. 2001)). In determining whether a plaintiff has prudential standing, a court must consider: "(1) whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch; (2) whether the plaintiff is asserting his or her own legal rights and interest rather that the legal rights and interests of third parties; and (3) whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit." *Id.* At trial, Mr. Ditto did not argue that the Bank was without constitutional standing to challenge the sale, but that the Bank did not satisfy the third of the above noted requirements for prudential standing in that it did not have statutory standing under the Bankruptcy Code because it did not own the property at the time of the sale and was not

the bankruptcy trustee. It is apparently undisputed that the Bank had constitutional standing to challenge the sale and that it also satisfied the first two requirements of the test for prudential standing, and the record does not show otherwise. Thus, we are relegated to determining whether the Bank satisfied the third prong of the test for prudential standing, that is, whether the Bank's interest falls within the zone of interests protected by the automatic stay.

Mr. Ditto argues that under both case law and statutory law, as codified at 11 U.S.C. §549, only the bankrupt and/or her trustee have standing to challenge an act that violated an automatic stay, and a creditor, such as the Bank, has no standing. Mr. Ditto also contends that the Bank's suit was barred by the statute of limitations under 11 U.S.C. § 549(d). The Bank's motion for summary judgment was based on § 362 of the Bankruptcy Code, not § 549. At 11 U.S.C. § 549, the Bankruptcy Code provides for instances where the bankruptcy trustee may avoid a transfer of property of the bankruptcy estate and the time period in which to do so.[2] We agree that only the trustee (or in the case of a Chapter 11 bankruptcy, a debtor-in possession), has standing to avoid a transfer under § 549, *In re Pointer*, 952 F.2d 82, 88 (5th Cir. 1992), and that such an action is subject to that section's two-year statute of limitations. However, the Bank's motion for summary judgment was not a motion under § 549, but was instead a motion to void an action in violation of the automatic stay under § 362. The distinction between § 362 and § 549 was noted in *In re Ford*, 296 B.R. 537, 548-49 (Bankr., N.D. Ga. 2003):

> [The debtor's] property cannot be removed from the bankruptcy court's exclusive jurisdiction except by appropriate proceedings in the bankruptcy court. Section 362(a) prohibits *involuntary* removal of assets unless permitted by lifting of the stay while other sections (such as § 363 and § 554) provide for the *voluntary* disposition of assets during the administration of the case if *authorized*. Section 549(a) provides a remedy for the avoidance of *voluntary* transfers that are *unauthorized*, for which § 549(c) provides protection to good faith purchasers under limited circumstances.
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> . . .

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[2] At 11 U.S.C § 549, it is provided in pertinent part as follows:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate -

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

. . .

(d) An action or proceeding under this section may not be commenced after the earlier of -

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

> [T]here is a difference between a transfer that improperly removes an asset from the estate as a result of unauthorized but *voluntary* action and one that improperly removes an asset through unauthorized and *involuntary* action. The purpose of § 549 is to protect the estate in the former situation when an unauthorized transfer occurs, often because the debtor initiates an unauthorized postpetition transfer. Section 549(a) establishes the general rule that the trustee may avoid such transfers to protect creditors, subject to the protection in § 549(c) for certain innocent purchasers. Section 362(a), in contrast, protects both the debtor and creditors from loss of an asset (or otherwise adverse results, such as entry of a judgment or other collection activity) by the collection activities of creditors attempting to exercise rights before the bankruptcy process even has a chance to work.

(Emphasis in original). *See also In re Smith*, 224 B.R. 44, 47 (Bankr. E.D. Mich. 1998) and *In re Abusaad*, 309 B.R. 895, 900 (Bankr. N.D. Tex. 2004).

The Bank filed its motion for summary judgment to challenge a violation of the automatic stay under § 362 and does not rely on § 549 as supporting authority for its cause of action. Therefore, neither the standing strictures nor the time limitations found in § 549 apply. *See In re Servico*, 144 B.R. 933, 935 (Bankr, S.D. Fla. 1992) ("Section 549(d) sets time limits within which a § 549 action must be brought. However, § 362 does not contain such time limits.").

Our review of both state and federal authority persuades us that the Bank does have standing as a creditor of Ms. Rock's bankruptcy case to challenge the tax sale as a violation of the automatic stay under § 362 because the automatic stay is intended to protect the interests of both creditors and debtors. As we recently noted in *State v. Delinquent Taxpayers*, No. M2004-000951-COA-R3-CV, 2006 WL 3147060 (Tenn. Ct. App. M.S., filed March 16, 2006):

> [T]he automatic stay is intended to protect the interests of both creditors and debtors. Therefore, in addition to the trustee, both debtors and creditors have standing to assert violations of the automatic stay. *Advanced Ribbons and Office Prods., Inc. v. U.S. Interstate Distrib., Inc. (In re Advanced Ribbons and Office Prods., Inc.)*, 125 B.R. 259, 263 (B.A.P. 9th Cir. 1991); *In re Bennett*, 317 B.R. 313, 318 (Bankr. D. Md. 2004).

In *United States v. Miller*, No. Civ.A.5:02-CV-0168-C, 2003 WL 23109906 (Dist. Ct. N.D. Tex., filed December 22, 2003), the court ruled that the United States had standing as a creditor to challenge a tax sale that was conducted in violation of the stay under § 362, stating as follows:

> The automatic stay provided by § 362 is intended to serve two separate interests. The first and most obvious interest served is that of the debtor, by providing him with a "breathing spell." *In re Pierce*,

272 B.R. 198, 203 (Bankr. S.D. Tex. 2001). This breathing spell permits the debtor to "attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." H.R.Rep. No. 595, 95th Cong., 1st Session 340-42 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News (U.S.C.C.A.N.) 5787, 6296-97.

Less obvious, but no less important interests protected by § 362 are those of creditors, who are "clearly intended to benefit from § 362." *Pointer*, 952 F.2d at 86; *see also Pierce*, 272 B.R. at 204 ("The stay is intended to benefit both debtors and creditors"); *Glendenning v. Third Fed. Savs. Bank (In re Glendenning)*, 243 B.R 629, 634 (Bankr. E.D. Pa. 2000) (noting that protection of creditors' interests is confirmed by fact that automatic stay arises even in face of debtor's dereliction in raising it). Congress intended to confer rights on creditors as parties for whose benefit the automatic stay was promulgated. *See In re Brooks*, 871 F.2d 89, 90 (9th Cir. 1989), *aff'g Brooks*, 79 B.R. 479 (9th Cir. B.A.P.1987). Creditors "are clearly parties in interest under the meaning of the Delaware Bankruptcy Code [where] they have a pecuniary interest that was adversely affected" by a postpetition transfer of property. *In re Reserves Dev. Corp.*, 78 B.R. 951, 957 (W.D. Mo. 1986) *rev'd on other grounds*, 821 F.2d 520 (8th Cir. 1987). The legislative history of § 362 clearly recognizes that creditors are beneficiaries when it states:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against debtor's property. Those who acted first would obtain payment of their claim in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

1978 U.S.C.C.A.N. at 6297. In short, the automatic stay provides fair and equal protection to creditors' interests in order to realize the goals of the Bankruptcy Code. *See Pierce*, 272 B.R. at 204 ("The stay is intended to benefit both debtors and creditors by assuring an equitable distribution of the debtor's assets and by preventing a race to the courthouse"); *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986) (preventing a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts").

Miller, 2003 WL 23109906, at *6.

Because the automatic stay protects both debtors and creditors, we determine that the Bank, as a creditor, had standing to challenge the tax sale to Mr. Ditto.

C. Voidability of Tax Sale

Having concluded that the Bank has standing to pursue its cause of action, we must now address the issue of whether the tax sale should be declared void.

In its motion for summary judgment, the Bank argued that, as an action in violation of the automatic stay, the tax sale to Mr. Ditto was void ab initio. This argument is supported by a majority of the federal circuits. *See In re Siciliano*, 13 F.3d 748, 750-51 (3d Cir. 1994); *In re Schwartz*, 954 F.2d 569, 570-72 (9th Cir. 1992); *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372-73 (10th Cir. 1990); *In re 48th Street Steakhouse*, 835 F.2d 427, 431 (2d Cir. 1987); *In re Albany Partners*, 749 F.2d 670, 675 (11th Cir. 1982); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *In re Smith Corset Shops*, 696 F.2d 971, 976 (1st Cir. 1982); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982). However, the Sixth Circuit holds that such an action is not void ab initio, but rather voidable. *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 911 (6th Cir. 1993). In reaching that conclusion, the court defined "void" and "voidable" as follows:

> "Void" is defined as "an instrument or transaction [that] is nugatory and ineffectual so that nothing can cure it." Black's Law Dictionary 1573 (6th ed. 1990); and as that "of no legal force or effect and so incapable of confirmation or ratification." Webster's Third New International Dictionary 2562 (1971). "Voidable" is defined as "not void in itself," Black's Law Dictionary 1574 (6th ed. 1990), and as "capable of being adjudged void, invalid, and of no force," Webster's Third New International Dictionary 2562 (1971). We think that "invalid" is a more appropriate adjective to use when defining an action taken against a debtor during the duration of the automatic stay. Like the word "void," "invalid" describes something that is without legal force or effect. However, something that is invalid is not incurable, in contrast to a void action which is incapable of being ratified.

Easley, 990 F.2d at 909.

The *Easley* court observed that under 11 U.S.C. § 362(d), a bankruptcy court has the power to annul a stay retroactively and that courts in several circuits have also recognized equitable exceptions to the stay. The court reasoned that actions in violation of the stay can only be described as voidable, if effect is to be given to the statutory authority of a bankruptcy court to annul a stay and to the allowance of equitable exceptions to the stay. Accordingly, the court concluded, "actions taken in violation of the stay are invalid and voidable and shall be voided absent equitable circumstances." *Id.* at 911. Both the Tennessee Court of Appeals and the federal bankruptcy courts sitting in this state have adopted *Easley* as controlling authority with respect to actions in violation of the stay. *See Southland Express, Inc. v. Scrap Metal Buyers of Tampa, Inc.*, 895 S.W.2d 335, 341

(Tenn. Ct. App. 1994); *In re Wilson*, 336 B.R. 338, 345 (Bankr. E.D. Tenn. 1995); and *Weaver v. City of Knoxville*, 179 B.R. 523, 527 (Bankr. E.D. Tenn. 1995).

In the case at bar, we reach the same result whether we apply the majority view of "void" or the minority view of "voidable" because the facts of this case do not justify an exception to the rule. As noted in *Easley*, "actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances." *Easley*, 990 F.2d at 911. The *Easley* court suggested that only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result will the protection of the automatic stay be unavailable to the debtor. *See also In re Camacho*, 311 B.R. 186, 192 (Bankr. E.D. Mich. 2004); *In re Dupuy*, 308 B.R. 843, 848 (Bankr. E.D. Tenn. 2004)*; In re Printup*, 264 B.R. 169, 175 (Bankr. E.D. Tenn. 2001); *In re Thomas*, 179 B.R. 523, 527 (Bankr. E.D. Tenn.1995). Citing *In re Smith*, 876 F.2d 524, 527 (6th Cir. 1989), the *Easley* court was further constrained to state, that "any equitable exception to the stay must be applied sparingly" and that "in the absence of an attempt to exploit the stay to gain an unfair advantage or 2) the fraudulent, willful delay in asserting the stay as a defense, actions taken during the pendency of the stay are void." *Easley*, 990 F.2d at 911.

Mr. Ditto does not contend, nor does the record show, that any of the limited equitable exceptions recognized in *Easley* are present in this case. There is no evidence that the stay was exploited to gain unfair advantage or that the stay was asserted as a defense after "fraudulent, willful delay." Instead, Mr. Ditto argues that only the bankruptcy court has jurisdiction to grant the Bank's request that the tax sale be declared void as a violation of the stay and that the Bank is precluded from reopening the bankruptcy case to obtain that remedy because it is guilty of laches, asserting that the Bank paid no real estate taxes, and apparently was unaware that no real estate taxes were paid from 1997 until late 2003. This jurisdictional argument is without merit. While the bankruptcy court has exclusive authority to allow a party relief from the stay, a nonbankruptcy court has jurisdiction to determine whether the stay applies at all. *In re Glass*, 240 B.R 782, 787 (Bankr. M.D. Fla. 1999). Thus, both the trial court and this court properly exercised jurisdiction in this matter.

Upon our finding that the Bank had standing to challenge the validity of the delinquent tax sale and that the tax sale violated the automatic stay, we hold that the sale was voidable, and because there are no equitable circumstances present to exempt the sale from the rule, the tax sale to Mr. Ditto is void and of no effect.

IV. Conclusion

For the foregoing reasons, the summary judgment in favor of Mr. Ditto is vacated, summary judgment is granted in favor of the Bank, and the tax sale to Mr. Ditto is declared to be void and of no effect. The case is remanded for further action as necessary consistent with our opinion herein. Exercising our discretion, we assess costs of this appeal equally between the parties.

SHARON G. LEE, JUDGE